Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

THE

AMERICAN LAW REGISTER.

APRIL 1874.

INVESTMENTS BY TRUSTEES.

I. THE question as to what are proper investments for trust funds, is one of the most important and most frequently recurring of those which daily suggest themselves to the profession. In some of our states laws have been passed, or rules have been laid down by the court protecting trustees from liability for losses which may ensue from investments made by them in good faith in specified securities. In Pennsylvania an executor, guardian or trustee may apply to the Orphans' Court, and the latter may direct an investment in the public funds of the United States, of the state, &c. (See Acts of 1832, 1838, 1850, 1852, &c.) In New York the rules of the court compel trustees to invest in real securities, or government bonds, or in the state loan, or in the loans of the New York Life Insurance and Trust Company: *Ackerman* v. *Emott*, 4 Barb. 626; *Smith* v. *Smith*, 4 Johns. Ch. 281–445. In New Jersey there is a statute authorizing investments to be made upon application to, and direction of, the court. No particular funds are mentioned, but the court has laid down the rule that investments must be made in government stocks or real security: *Gray* v. *Fox*, Saxton 259. In Maryland the court does not approve of changes in investments, unless express power is given in the instrument of trust: *Murray* v. *Feinor*, 2 Md. Ch. 418; *Evans* v. *Iglehart*, 6 Gill & J. 192; *Lynch* v. *McDonald*, 8 Gill 405; and if there be a surplus consisting of money, an investment should be made by the executor in some safe fund, or on adequate securities under the authority and direction of the proper court: *Evans* v. *Iglehart*, 6 Gill & J. 196–7. In Maine, New Hampshire, Vermont, Michigan

and Missouri, the courts may direct trustees as to the manner of investment, although none are specially pointed out by statute. In Georgia trustees may invest without danger in the stocks, bonds or other securities issued by that state. In Mississippi an investment in bank stocks is permitted. In Indiana a sale made in contravention of a trust is void: Act of 1852; *Hodgson* v. *Macy*, 8 Ind. 122; *Wright* v. *Bundy*, 11 Ind. 400. In states where there are no statutes or rules of court which regulate investments, trustees are not responsible for loss where they have acted with prudence and good faith: *Clark* v. *Garfield*, 8 Allen 427. Where there is a direction to invest on good and sufficient security, the court will not sanction such as are not permitted by its rules: 1 Beav. 128; 3 Md. 440; *Ryder* v. *Bickerton*, 3 Swans. 80, n. The laws above mentioned are for the protection of trustees, and do not confine them to such investments as are therein prescribed: *Stanley's Appeal*, 8 Penn. 432; *Morris* v. *Wallace*, 3 Id. 319; *McCahan's Appeal*, 7 Id. 56; *Rush's Est.*, 12 Id. 378; *Hemphill's Appeal*, 18 Id. 303; *Nyce's Est.*, 5 W. & S. 254; *Johnson's Appeal*, 43 Penn. 431; *Seidler's Est.*, 5 Phila. 85; *Barton's Est.*, 1 Pars. Eq. 24; *Twaddell's Appeal*, 9 Barr 108; 5 Barr 18. Other investments, however, are in such cases made at the peril of the trustee, and the fact that his own property has been injudiciously invested by him in the same manner as that of his *cestui que trust*, though it may repel the presumption of fraud, will not free him from liability for whatever loss may arise therefrom: 43 Penn. 431. Where a power of sale exists, the safe rule is to invest in legal securities, and where no such power is given an order to sell should be obtained from the court of proper jurisdiction.

II. Wherever the nature of the trust or the description of the property renders the necessity for a sale probable, a power of sale should always be inserted in the instrument creating the trust. If that is not given, and a necessity for a sale arise, the power to do so must be obtained from the proper court, and if trustees sell without such power they would be liable for any loss which might occur thereby to the *cestui que trust*. Executors and administrators have *ex virtute officii*, a power to dispose of the decedent's property, so far at least as not to affect a *bonâ fide* purchaser: *Bayard* v. *Bank*, 2 P. F. Smith 232.

III. But the case of a trustee is different. A power of sale is not necessarily presumed, because usually unnecessary for the fulfil-

ment of their duties. But they may obtain leave from the proper court to change investments, provided the court is satisfied that the change is beneficial. This is the only remedy where the creator of the trust has given no power of sale, and where the investment is in the judgment of the trustee dangerous. This power, exercised by the courts, of directing or authorizing sales, depends, in the absence of a statute, upon the principle that where the trustee has acted under the direction of the court, he will be protected by it. This is the case in England, and in those states in which there are no such statutes as those above mentioned.

It is true that cases occasionally arise where it is desirable to part at once with trust property, without the delay and publicity of an order of court. Occasional inconvenience is, however, no excuse for departing from a rule which, as reason demonstrates, is built on the most solid foundations. Such inconvenience, too, can only arise from the carelessness of the creator of the trust or the improper conduct of the trustee. It cannot occur where a power of sale is given to the trustee in the original instrument (and where the power does not appear it is not unreasonable to suppose that it was intended to be withheld), and it ought not to arise where having once been given in the trust instrument, or obtained by the trustee from the proper court, the power to sell has been exercised for the benefit of the *cestui que trust;* for where trust funds are once properly invested, it is almost inconceivable that a necessity should suddenly arise for changing the security. In a country and at a time where speculation in stocks has grown to be an epidemic madness, courts of justice would hardly go out of their way to establish a rule permitting trust funds to be at the complete mercy of a trustee, where by the absence of authority on the subject there exists a strong presumption that the creator of the trust intended to withhold from the trustee in the interest of a helpless *cestui que trust* what he deemed unnecessary powers for the beneficial management of the estate.

The above remarks are equally applicable to the sale of real and personal estate. In the *Earl of Winchelsea* v. *Norcliffe*, 1 Vernon 434, the trustees of an infant saved 3000*l.* out of the profits of his real estate, and laid it out in the purchase of adjoining lands, the infant dying within age, it was decreed that the trustees should account to the infant's executors for the 3000*l.* This case was argued before Mr. Justice LUTWICH, Lord Chief Baron ATKINS, the

Chancellor (Lord JEFFREYS,) and the Master of the Rolls, Sir JOHN CHURCHILL. The three former decided that the trustees were accountable to the executor of the infant, the latter having died before he was capable of ratifying the action of the trustees. The Lord Chancellor said (p. 436–7) "he did agree that if the trustees had come to this court and obtained a decree for the investing this money in a purchase, this court would have maintained its own decree; but not having so done, but voluntarily put an election in an infant, who never made any, he thought they remained personally accountable for the 3000*l.* as being part of the infant's personal estate." So in *Awdley* v. *Awdley*, 2 Vernon 192, the committees of a lunatic invested part of his personal estate in the purchase of lands in fee. The court, after great debate, and upon reading the statute made touching the granting of the custody of lunatics, whereby it is provided that the surplus shall be safely kept and delivered to him, if he recover, if not, to be employed upon his death for the benefit of soul, &c., decreed that the lands purchased be sold and the money to go, and be divided as personal estate, among the next of kin. These decisions proceeded on the theory that no unauthorized conversion of either real or personal estate ought to be made by trustees by which the course of descent was changed. But Lord JEFFREYS expressly said that if the trustee had obtained a decree from the court to invest the trust-funds in a purchase, the court would have maintained its own decree; from which it may be inferred that if it be for the evident benefit of the *cestui que trust*, the court will permit conversion under its own direction, but will regard with a jealous eye any attempt on the part of trustees to exceed their express authority. It has never been doubted that an express power of sale was necessary to convert real estate into personalty even where the object of the sale was to reinvest in real estate, except in some few cases where a power of sale is necessarily implied. A power generally "to raise a sum" out of an estate, enables a sale of it: *Wareham* v. *Brown*, 2 Vern. 153. So a proviso, that if one fund should be insufficient to pay his debts, his executors should *raise* the same *out of* his copyhold premises, authorizes a sale, although they are given by a prior part of the will to his family: *Bateman* v. *Bateman*, 1 Atk. 421; and however obscurely in a will the intention may be expressed, yet if it appear that a power of sale was intended, a sale will be

supported: *Warneford* v. *Thompson*, 3 Ves. Jr. 513. See Sugden on Powers, vol. 2, *p. 538. That the rule is the same in regard to the sale of personal estate may be gathered from several recently decided cases, and from frequently occurring *dicta* of judges.

In *Bayard* v. *The Bank*, 2 P. F. Smith 232, it was held that a bank was not liable for damages in refusing to allow a trustee to transfer without being shown the instrument creating the trust, *because* it would be liable for allowing the transfer *unless authorized by such instrument.* "There is," says Judge STRONG, "a marked difference between the powers of an administrator or executor, and those of an ordinary trustee. * * * No purchaser, either of land or personalty, would be safe in buying from a known trustee without looking at the nature and extent of his trust. It is true a trustee may have power to sell, but the power is not a necessary incident to his trust, as it is to the office of an executor. He may have the legal title, and yet have no authority to sell. His sale may be entirely unauthorized by the instrument that created the trust; it may have been forbidden. Why then does not a bank or a transfer agent act at its peril when permitting him to make a transfer? If in truth he has no such power, the bank, by accepting his certificates and issuing others in lieu thereof to his transferree, is assisting him to destroy the rights of the *cestui que trust.* It has even been held that a corporation is liable, if it permit a transfer by a lunatic holding a legal right, though it had no knowledge of the lunacy, and was guilty of no actual fault: *Chew & Goldsborough* v. *Bank of Baltimore*, 14 Md. 299. If thus liable when only the innocent cause of a loss, much more is the liability certain where the transfer is permitted with full knowledge that the stock does not belong to the person who offers to transmit it to another. * * * There is no case in which it has been ruled that a trustee of stock, whose certificate shows a declared trust for another named, has a right to transfer it without showing a power beyond his certificate. * * * A stakeholder cannot very safely pay over to him who has the legal right, when he knows another to be the beneficial owner. With equal reason, at least, ought it to be held illegal for a corporation to aid in destroying the title of a *cestui que trust* to its stock without being satisfied that the trustee had authority to part with and destroy it."

In *Lowry* v. *Commercial and Farmers' Bank of Baltimore*, Taney's C. C. Decisions 360, the case was substantially as follows:

A testator bequeathed some shares of the stock of the Farmers' and Mechanics' Bank of Baltimore to L. for life, with remainder over, and the dividends during that time were to be received by his executors (one of whom was J.), as trustees for L., and by them paid over to her. Eight years after the testator's death J. proposed to transfer the stock which still stood in the name of the testator. This transfer was permitted, and new certificates were made out to the Merchants' Bank of Baltimore, the transferees, which did not mention the name in which the stock had been held or that of the vendor. These new certificates were pledged by J. to the Merchants' Bank as collateral security for a loan. The executor failed, being a large debtor to the Merchants' Bank, and a bill in equity was filed by M. against the Commercial Farmers' Bank of Baltimore and the Merchants' Bank.

The latter was held not liable, because there was nothing to give it notice of a breach of trust in the conduct of the executor, the bank always supposing that the stock was his own, and there being nothing on the face of the certificate to give it notice that he held the stock as executor. The former bank was held liable:

1. Because, as the stock stood on its books in the name of the testator, it had constructive notice of this will (see also *Caldecott* v. *Caldecott*, 4 Mad. 190), and the will showed that the stock was not to be sold, it being bequeathed to M. for life, with remainder over.

2. Though if it had been necessary, the stock might have been sold by the executor to pay the debts of the testator, yet, the fact that he had died rich eight years before the transfer, and that the time for settling his estate by the executors had therefore long passed, was abundantly sufficient as constructive notice that the executor was misapplying the assets: *Keane* v. *Roberts*, 4 Mad. 332–3.

3. Because in Maryland (as in many other states) an executor is permitted by Act of Assembly to procure an order of sale from the Orphans' Court whenever a sale may be necessary, "and the proposition of one of two executors to transfer this stock, so long after the death of a wealthy testator, without first obtaining an order from the court to justify him, must have satisfied any man of common experience in business that he was grossly abusing his trust:" *Keane* v. *Roberts*, 4 Mad. 334–5. See also *Saxon* v. *Garrett*, 4 Dessau. Ch. 522.

We may add that, although the testator may have chosen the same persons to officiate as executors and trustees, after a reasonable time has elapsed for settling the estate, the executors will be considered to have assumed the character of trustees, and will be treated by the court as if they and the executors had originally been different persons.

IV. A corporation for banking purposes, by the charter of which the stock is only transferable at the bank and by rules established by the directors, is a trustee for holders of its stock, and is responsible for any injury sustained by its negligence or misconduct: *Lowry* v. *Bank*, Taney's C. C. Decisions 329–30. It is responsible for the acts of its officers, and must answer for their negligence or default wherever the rights of a third party are concerned: p. 300, and *Hodges* v. *Planters' Bank*, 7 Gill & Johns. 306, 310.

In *Duncan* v. *Jaudon*, 15 Wallace 165, although not necessary to decide the point in question, Mr. Justice DAVIS says: "But why change the investment when the canal stock, one of the most stable of its kind in the country, was paying on the average a semi-annual dividend of five per cent.? Experience had shown that it was safe and yielded a large income, and no prudent trustee, having once invested in it, and had his conduct approved, looking alone to the interest of his *cestui que trust*, would take the hazard of selling it and purchasing another. *But there was no authority to sell it, even were it desirable to do so, or to deal with it so that a sale might become necessary.* If Jaudon thought so, there was no foundation for his belief." In that case, by the terms of the will the trustees had power to invest the whole of testator's property (except certain specified securities) in the stocks of the United States, or the stock or funds of any individual state, and the interest of one-fourth thereof was to be paid to Mrs. Jaudon for life, with remainder to her children. This was therefore like the case of *Bayard* v. *The Bank* in 2 P. F. Smith, and the *dicta* just quoted sustain the rule even more strongly than the case of *Lowry* v. *The Bank*, before referred to, because in the latter case the bequest of stock was specific. The original trustees did not sell the stock in question, but Mr. Jaudon, the defendant and substituted trustee, did so. This was known to and acquiesced in by the *cestui que trust*. If therefore, according to the words of Mr. Justice DAVIS, the trustee could not sell without leave of the proper

court investments improperly made by himself, and which originally constituted a breach of trust, *à fortiori* a trustee cannot sell investments left by the creator of the trust without leave of court, in the absence of express power to do so in the instrument creating the trust.[1]

V. In his Treatise on Trusts, Mr. Perry says (§ 465), that there is no sound distinction between original investments improperly made by trustees and investments made by the testator himself, and continued by the trustee. In this remark, however, he is not sustained by the cases, which in an abundance of instances show the contrary of this proposition to be true. In England particularly, where the rule is that an executor or trustee investing in any funds but the three per cents will be held accountable for loss to the trust property, there have been repeated instances where insecure investments made by the testator resulted in loss, and yet the trustees and executors, whose duty it was to have changed them, have been held not liable, because the investments had originally been made by the testator.

In *Lord Dorchester et al.* v. *The Earl of Effingham et al.*, Taml. 279 (1829, by Sir JOHN LEACH, Master of the Rolls), executors depositing moneys belonging to the estate with the same persons as the testator intrusted with his moneys in his lifetime, although they were not bankers, were held not liable for a loss sustained by the latter becoming bankrupt. In *Sadler* v. *Turner*, 8 Ves. Jr. 617 (1803, Sir WILLIAM GRANT, Master of the Rolls), the court refused to call in the property of an infant, upon security in India, the master reporting it to be for the infant's benefit, that it should remain invested in India. In *Buxton* v. *Buxton*, 1 M. & C. 80 (1835, Sir C. PEPYS, Master of the Rolls), an executor who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted throughout with diligence and good faith, was held under the circumstances not to be liable for the loss consequent on his not having sold them sooner. In this case there was a difference of opinion between the two executors as to the propriety of converting the

[1] See *The Appeal of Pennsylvania Co., &c.*, vol. 31, p. 76 (March 6th 1874) of Legal Intelligencer. The argument on this point is very fully reported. The decision went off on another point.

Mexican bonds at a particular period, which was followed by a demand made by one of them upon the other to concur in effecting an immediate sale, yet this fact was held not to deprive the latter of his rights to exercise his own discretion, or render him liable for the loss that arose from the delay consequent to his declining to comply with the demand.

In *Robinson* v. *Robinson*, 1 De G. M. & G. 247 (1851), a testator directed his trustees to invest trust-moneys in parliamentary stocks or funds, or on real securities, and they omitted so to invest it, but part of his property at the time of his death was invested in turnpike bonds. It was held that the trustees under the will were not chargeable with the loss which had arisen from the depreciation in the value of the turnpike bonds since the testator's death.

See also *Powell* v. *Evans*, 5 Ves. 841; *Clough* v. *Bond*, 3 M. & Cr. 496; *College* v. *Hospital*, 9 Pick. 446; *Thompson* v. *Brown*, 4 Johns. Ch. 628; *Knight* v. *Lord Plymouth*, 3 Atk. 480; s. c., 1 Dick. 120; *Rowth* v. *Howell*, 3 Ves. 565; *Wilkinson* v. *Stafford*, 1 Ves. Jr. 41; *Vez* v. *Emery*, 5 Ves. 144; *Barton's Est.*, 1 Pars. Eq. 24; *Murray* v. *Feinor*, 2 Md. Ch. 418; *Brown* v. *Campbell*, Hopkins 233; *Smith* v. *Smith*, 4 Johns. Ch. 283.

Where the *cestui que trust* concurs in the breach of trust, he is estopped from proceeding against the trustee: *Brice* v. *Stokes*, 11 Vesey 319; *Booth* v. *Booth*, 1 Beav. 125, &c., &c.; but he must know that the acts in which he concurs are a breach of the trust, and he must be capable of acting for himself: *Buckeridge* v. *Glasse*, 1 Cr. & Phil. 135; and neither a *feme covert* nor an infant can concur in a breach of trust as they have no authority to contract: *Walker* v. *Symonds*, 3 Swanst. 80 and cases there cited; *Underwood* v. *Stevens*, 1 Mer. 717; *Parkes* v. *White*, 11 Vesey 221; *Needler* v. *Bishop of Winchester*, Hobart 225; *Taylor* v. *Glanville*, 3 Mad. 98; *Smith* v. *French*, 2 Atk. 243; *Montford* v. *Cadogan*, 19 Vesey 639; *Cresswell* v. *Dewell*, 4 Gif. 460. A married woman may concur in a breach of trust as regards estates settled to her separate use, where she procures or induces the trustee to commit a breach of trust, for there the court treats her act as an alienation of the estate so far as she had power to bind it: *Crosby* v. *Church*, 3 Beav. 485; *Hanchette* v. *Briscoe*, 22 Beav. 496; *Whisler* v. *Newman*, 4 Ves. 129; *Parks* v. *White*, 11 Ves. 223; *Brewer* v. *Twirles*, 2 Sm. & G. 219; *Hughes* v. *Wells*,

9 Hare 772, 774; *Mara* v. *Manning*, Jones & Lat. 311; but where there is a clause in the instrument against anticipation she cannot concur in the breach of trust: *Clive* v. *Carew*, 1 Johns. & Hem. 199. A *cestui que trust* may also be debarred from relief by long acquiescence in a breach of the trust, though he did not originally concur in it: *Harden* v. *Parsons*, 1 Eden 145; Perry on Trusts, chap. 28, *passim*. A neglect to sue for twenty years will bar relief: *Brown* v. *Cross*, 14 Beav. 105; *Bright* v. *Legerton*, 29 Beav. 60; *Hodgson* v. *Bibby*, 32 Beav. 221. But a neglect to sue for a few years without other acquiescence is not a bar: *Knight* v. *Bowzer*, 2 De G. & J. 421; *Cooper* v. *Greene*, 3 De G. F. & J. 72, 74, 77. Nor can any acquiescence be inferred until the *cestui que trust* has actual knowledge of the breach: *Thompson* v. *Finch*, 22 Beav. 329, s. c. 8 De G. M. & G. 560; *Cooper* v. *Greene*, 3 De G. F. & J. 73; *Prevost* v. *Gratz*, 6 Wheat. 487; *Mellish's Estate*, 1 Pars. Eq. 486; *Beeson* v. *Beeson*, 9 Penna. 300. All agreements between the *cestui que trust* and the trustee are looked upon with suspicion by the court; in order therefore that any acquiescence may have effect, the *cestui que trust* must have full knowledge of all the past circumstances of the case: *Walker* v. *Symonds*, 3 Swanst. 1; *Randall* v. *Erington*, 10 Ves. 423; *Vyvyan* v. *Vyvyan*, 30 Beav. 65; *Eves* v. *Hickson*, 30 Beav. 142; *Bolding* v. *Lane*, 1 De G. J. & S. 119; *Cooper* v. *Greene*, 3 De G. F. & J. 74; *Wedderburn* v. *Wedderburn*, 4 M. & C. 41; *Broadhurst* v. *Balguy*, 1 Y. & Col. 16; *Downes v. Bullock*, 25 Beav. 62.

The law in relation to the subjects discussed, may be briefly summed up as follows :—

I. Where there is no express power of sale in the instrument creating a trust, and none is necessarily implied, and the discretion of the trustee is the sole restriction upon investments, he will generally be protected where he has acted *bonâ fide* and with reasonable diligence and prudence. But in a state where the trustee is protected from loss which may arise from certain specified and so-called legal investments, the rule is much more stringent, and extraordinary care and diligence is required of the trustee as well as *bona fides*, and it is dangerous to invest trust-funds in any other securities than those thus indicated.

II. But where there is no express power of sale given, and where none such can necessarily be implied from the nature of the

trustee's duties, the only safe means of changing an insecure investment left so by the creator of the trust, is to make the change under the direction of the proper court, and if done without such authority, the trustee will be liable to the *cestui que trust* for breach of trust.

III. Where there is no such power of sale and the trustee leaves unchanged an investment made by the testator and loss ensues, he will generally be protected, if acting with *bona fides*, even in cases where if there had been a power of sale and he had neglected to sell, he would have been liable under Rule I., laid down above.

IV. Where a bank or other corporation permits a trustee holding certificates of its stock, transferable only by one of its officers, and on which the name of the legal owner appears as trustee for another, to part with that stock, and no remedy can be enforced against the trustee, the corporation is held to have constructive notice of the contents of the instrument creating the trust, and if the trustee has exceeded his powers or in any way committed a breach of trust with the involuntary aid of the corporation, the latter will be held liable to the same extent as the trustee.

V. Executors and administrators have *virtute officii* a power to sell the estate of the decedent, and unless they have become trustees by the length of time which has elapsed since the conclusion of all of the duties of the office of executor, a corporation permitting a transfer at their instance would not, without notice and if acting with *bona fides*, be held liable therefor. A. S. B.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

UNITED SOCIETY OF SHAKERS *v.* UNDERWOOD ET AL.
WM. DAVENPORT *v.* SAME.

Bank directors will be held responsible to the depositors for the loss or conversion by the bank of special deposits in such bank, whenever they know of such conversion, or might have known of it by the exercise of such care and diligence as the law requires of such officers in representing the affairs of the bank.

Bank directors must be considered as affected with the knowledge of such facts as appear upon the bank books.

THE first case was an appeal from the judgment of the Franklin Circuit Court, and the latter from that of the Warren Court